

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RANDALL E. ELLIS,

No. C-10-2957 TEH (PR)

Plaintiff,

v.

ORDER OF SERVICE; INSTRUCTIONS  
TO THE CLERK

K. BRANDON, et. al.,

Defendant(s).

\_\_\_\_\_ /

Plaintiff, a prisoner at Pelican Bay State Prison ("PBSP") in Crescent City, California, has filed a pro se civil rights Complaint under 42 U.S.C. § 1983 alleging that PBSP correctional officers violated his constitutional rights. Doc. #1. Plaintiff also seeks leave to proceed in forma pauperis, which the Court GRANTS in a separate order. In this Order, the Court will conduct its initial review of the Complaint pursuant to 28 U.S.C. § 1915A.

I

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or

1 officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).  
2 In its review the Court must identify any cognizable claims, and  
3 dismiss any claims that are frivolous, malicious, fail to state a  
4 claim upon which relief may be granted, or seek monetary relief from  
5 a defendant who is immune from such relief. Id. § 1915A(b)(1) &  
6 (2).

7 To state a claim under 42 U.S.C. § 1983, a plaintiff must  
8 allege that a person acting under the color of state law committed a  
9 violation of a right secured by the Constitution or laws of the  
10 United States. West v. Atkins, 487 U.S. 42, 48 (1988).  
11 Pleadings filed by pro se litigants, however, must be liberally  
12 construed. Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010);  
13 Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir.  
14 1990).

## 15 16 II

17 In the instant Complaint, Plaintiff alleges that PBSP  
18 Captain K. Brandon and Institutional Gang Investigators J. Silveira  
19 and C. Countess violated his First Amendment rights by interfering  
20 with his mail delivery service. Plaintiff further alleges that  
21 these same Defendants interfered with his mail delivery service as a  
22 retaliatory act in violation of the First Amendment.

### 23 24 A

25 Prisoners enjoy a First Amendment right to send and  
26 receive mail. See Witherow v. Paff, 52 F.3d 264, 265 (9th Cir.

1 1995) (citing Thornburgh v. Abbott, 490 U.S. 401, 407 (1989)). A  
2 prison, however, may adopt regulations or practices which impinge on  
3 a prisoner's First Amendment rights as long as the regulations are  
4 "reasonably related to legitimate penological interests." See  
5 Turner v. Safley, 482 U.S. 78, 89 (1987). The Turner standard  
6 applies to regulations and practices concerning all correspondence  
7 between prisoners and to regulations concerning incoming mail  
8 received by prisoners from non-prisoners. See Thornburgh, 490 U.S.  
9 at 413.

10 In the case of outgoing correspondence from prisoners to  
11 non-prisoners, however, an exception to the Turner standard applies.  
12 Because outgoing correspondence from prisoners does not, by its very  
13 nature, pose a serious threat to internal prison order and security,  
14 there must be a closer fit between any regulation or practice  
15 affecting such correspondence and the purpose it purports to serve.  
16 See Thornburgh, 490 U.S. at 411-12. Censorship in such instances is  
17 justified only if: (1) the regulation or practice in question  
18 furthers one or more of the substantial governmental interests of  
19 security, order and rehabilitation; and (2) the limitation on First  
20 Amendment freedoms is no greater than necessary to further the  
21 particular government interest involved. See Procunier v. Martinez,  
22 416 U.S. 396, 413 (1974), overruled on other grounds, Thornburgh v.  
23 Abbott, 490 U.S. 401, 413-14 (1989); see, for example, Witherow, 52  
24 F.3d at 265-66 (regulation requiring visual inspection of outgoing  
25 mail from inmates to certain public officials *closely* related to  
26 legitimate penological interest of preventing prisoners from  
27  
28

1 disseminating harmful or offensive materials and avoids unnecessary  
2 intrusion) (emphasis added).

3 A district court reviewing whether a prisoner states a  
4 claim for the censorship of outgoing mail should not decide, on the  
5 pleadings, whether the alleged censorship is justified. See Barrett  
6 v. Belleque, 544 F.3d 1060, 1062 (9th Cir. 2008) (per curiam)  
7 (holding district court erred by dismissing complaint for failure to  
8 state a claim by deciding on the pleadings that censorship was  
9 justified). A prisoner complaint that unequivocally pleads facts  
10 alleging that prison officials censored his outgoing mail and  
11 punished him for its contents states a claim that is clearly  
12 cognizable under Procunier. Id.

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14 B

15 Within the prison context, a viable claim of First  
16 Amendment retaliation entails five basic elements: (1) An assertion  
17 that a state actor took some adverse action against an inmate (2)  
18 because of (3) that prisoner's protected conduct, and that such  
19 action (4) chilled the inmate's exercise of his First Amendment  
20 rights, and (5) the action did not reasonably advance a legitimate  
21 correctional goal. Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th  
22 Cir. 2005).

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24 C

25 Liberally construed, Plaintiff's First Amendment claims  
26 appear to state cognizable claims under 42 U.S.C. § 1983 and  
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1 Defendants PBSP Captain K. Brandon and Institutional Gang  
2 Investigators J. Silveira and C. Countess will be served.

3  
4 III

5 Plaintiff also alleges in his Complaint that PBSP  
6 correctional officers M. Dotson and S. Burris violated his  
7 constitutional rights concerning actions and incidents that are  
8 completely separate and apart from the allegations of First  
9 Amendment mail interference and retaliation against Defendants  
10 Brandon, Silveira and Countess.

11 Federal Rule of Civil Procedure 20 allows persons to be  
12 joined in one action as defendants so long as: (1) the right to  
13 relief asserted against each defendant arises out of or relates to  
14 the same transaction or occurrence, or series of transactions or  
15 occurrences; and (2) a question of law or fact common to all  
16 defendants arises in the action. See Fed. R. Civ. P. 20(a)(2).

17 Here, because the allegations against M. Dotson and S.  
18 Burris are not related either temporally or substantively to the  
19 allegations against Defendants Brandon, Silveira and Countess, the  
20 allegations against M. Dotson and S. Burris must be brought in a  
21 separately-filed action.

22  
23 IV

24 For the foregoing reasons, the Court orders as follows:

25 1. The clerk of the Court shall issue summons and the  
26 United States Marshal shall serve, without prepayment of fees, a  
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1 copy of the Complaint, all attachments thereto, and a copy of this  
2 Order upon Defendants Captain K. Brandon and Institutional Gang  
3 Investigators J. Silveira and C. Countess at Pelican Bay State  
4 Prison, (P.O. Box 7000, Crescent City, CA 95531-7000). All other  
5 named defendants, i.e., PBSP correctional officers M. Dotson and S.  
6 Burris are DISMISSED from this action. The clerk is further  
7 directed to send to Plaintiff a court-approved civil rights  
8 complaint form should Plaintiff choose to initiate a separate action  
9 against M. Dotson and S. Burris.

10 2. To expedite the resolution of this case, the Court  
11 orders as follows:

12 a. No later than ninety (90) days from the date of  
13 this Order, Defendants shall file a motion for summary judgment or  
14 other dispositive motion. A motion for summary judgment shall be  
15 supported by adequate factual documentation and shall conform in all  
16 respects to Federal Rule of Civil Procedure 56, and shall include as  
17 exhibits all records and incident reports stemming from the events  
18 at issue. If Defendants are of the opinion that this case cannot be  
19 resolved by summary judgment or other dispositive motion, they shall  
20 so inform the Court prior to the date their motion is due. All  
21 papers filed with the Court shall be served promptly on Plaintiff.

22 b. Plaintiff's opposition to the dispositive motion  
23 shall be filed with the Court and served upon Defendants no later  
24 than thirty (30) days after Defendants serve Plaintiff with the  
25 motion.

26 c. Plaintiff is advised that a motion for summary  
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1 judgment under Rule 56 of the Federal Rules of Civil Procedure will,  
2 if granted, end your case. Rule 56 tells you what you must do in  
3 order to oppose a motion for summary judgment. Generally, summary  
4 judgment must be granted when there is no genuine issue of material  
5 fact - that is, if there is no real dispute about any fact that  
6 would affect the result of your case, the party who asked for  
7 summary judgment is entitled to judgment as a matter of law, which  
8 will end your case. When a party you are suing makes a motion for  
9 summary judgment that is properly supported by declarations (or  
10 other sworn testimony), you cannot simply rely on what your  
11 complaint says. Instead, you must set out specific facts in  
12 declarations, depositions, answers to interrogatories, or  
13 authenticated documents, as provided in Rule 56(e), that contradicts  
14 the facts shown in the Defendants' declarations and documents and  
15 show that there is a genuine issue of material fact for trial. If  
16 you do not submit your own evidence in opposition, summary judgment,  
17 if appropriate, may be entered against you. If summary judgment is  
18 granted, your case will be dismissed and there will be no trial.  
19 Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998) (en banc)  
20 (App. A).

21           Plaintiff also is advised that a motion to dismiss for  
22 failure to exhaust administrative remedies under 42 U.S.C. §  
23 1997e(a) will, if granted, end your case, albeit without prejudice.  
24 You must "develop a record" and present it in your opposition in  
25 order to dispute any "factual record" presented by the Defendants in  
26 their motion to dismiss. Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14

1 (9th Cir. 2003).

2 d. Defendants shall file a reply brief within  
3 fifteen (15) days of the date on which Plaintiff serves them with  
4 the opposition.

5 e. The motion shall be deemed submitted as of the  
6 date the reply brief is due. No hearing will be held on the motion  
7 unless the Court so orders at a later date.

8 3. Discovery may be taken in accordance with the Federal  
9 Rules of Civil Procedure. No further Court order is required before  
10 the parties may conduct discovery.

11 4. All communications by Plaintiff with the Court must  
12 be served on Defendants, or Defendants' counsel once counsel has  
13 been designated, by mailing a true copy of the document to  
14 Defendants or Defendants' counsel.

15 5. It is Plaintiff's responsibility to prosecute this  
16 case. Plaintiff must keep the Court and all parties informed of any  
17 change of address and must comply with the Court's orders in a  
18 timely fashion. Failure to do so may result in the dismissal of  
19 this action pursuant to Federal Rule of Civil Procedure 41(b).  
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21  
22 IT IS SO ORDERED.

23 DATED 04/08/2011

  
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24 THELTON E. HENDERSON  
United States District Judge  
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